Supreme Court, U.S.
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No. 92-1924

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

JAMES CARTER, MICHAEL BROWNWOOD, and DREXTEL HOPKINS,
Petitioners,
v.
HONDA MOTOR COMPANY, LTD., AMERICAN HONDA MOTOR CO., INC., and HONDA R&D CO., LTD.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether this Court should review a decision of the United States Court of Appeals for the Eighth Circuit dismissing the appeal of appellants who were not parties to the underlying action, who did not intervene or move to intervene in the underlying action, who therefore lacked jurisdictional standing to appeal the judgment of the district court under *Marino v. Ortiz*, 484 U.S. 301 (1988) (per curiam), and who also lacked standing to appeal based on prudential considerations articulated by this Court in *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 474-75 (1982).

PARTIES TO THE PROCEEDINGS

The following persons or entities participated in the proceedings in the United States District Court for the Western District of Arkansas and in the United States Court of Appeals for the Eighth Circuit:

1) Bonita Wilburn and Leo Wilburn,
   Plaintiffs in the District Court

2) American Honda Motor Co., Inc., Honda Motor Co., Ltd., and Honda R&D Co., Ltd.,

   Defendants in the District Court
   Appellees in the Court of Appeals
   Respondents in the Supreme Court

3) Michael Brownwood, James Carter, and Drextel Hopkins

   Nonparty Movants in the District Court
   Appellants in the Court of Appeals
   Petitioners in the Supreme Court

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES TO THE PROCEEDINGS	ii
TABLE OF AUTHORITIES	iv
STATEMENT OF THE CASE	1
REASONS FOR DENIAL OF THE PETITION	6
I. THE ISSUES PRESENTED IN NONPARTY APPELLANTS' PETITION ARE NOT OF A CHARACTER THAT WARRANTS DISCRETIONARY REVIEW BY THIS COURT	6
II. THE COURT OF APPEALS PROPERLY DISMISSED THE APPEAL BECAUSE NONPARTY APPELLANTS WERE NOT PARTIES, DID NOT INTERVENE, WERE NOT THE SUBJECTS OF ANY ORDER, AND LACKED STANDING TO APPEAL THE DISTRICT COURT'S JUDGMENT	7
III. THE COURT OF APPEALS CORRECTLY APPLIED ITS OWN LOCAL RULE IN DISMISSING NONPARTY APPELLANTS' APPEAL	11
CONCLUSION	13
APPENDIX	
A. Rule 29.1 List	1a
B. March 20 Protective Order and Written Agreement of Paul A. Nelson to be bound by March 20 Protective Order	5a

TABLE OF AUTHORITIES

Cases Page

Commercial Sec. Bank v. Walker Bank & Trust Co., 456 F.2d 1352 (10th Cir. 1972) 11
Duke Power Co. v. Carolina Envtl. Study Group Inc., 438 U.S. 59 (1978) 10
Estate of Bishop v. Bechtel Power Corp., 905 F.2d 1272 (9th Cir. 1990) 9
Hal Roach Studios, Inc. v. Richard Feiner & Co., 896 F.2d 1542 (9th Cir. 1989) 11
Hispanic Society v. New York City Police Dept., 806 F.2d 1147 (2d Cir. 1986), *aff'd sub nom. Marino v. Ortiz*, 484 U.S. 301 (1988) 7, 8
Hoxworth v. Blinder, Robinson & Co., 903 F.2d 186 (3d Cir. 1990) 11
Johnson v. Trueblood, 629 F.2d 302 (3d Cir. 1980) 11
Marino v. Ortiz, 484 U.S. 301 (1988) 6, 7, 8, 9
Overby v. United States Fidelity & Guar. Co., 224 F.2d 158 (5th Cir. 1955) 11
Securities and Exch. Comm'n v. Wencke, 783 F.2d 829 (9th Cir.), *cert. denied*, 479 U.S. 818 (1986) 11
Simon v. Eastern Kentucky Welfare Rights Org., 426 U.S. 26 (1976) 10
United States v. Little Joe Trawlers, Inc., 780 F.2d 158 (1st Cir. 1986) 9
Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464 (1982) 6, 9, 10

Rules of Court

Supreme Court Rule 10.1 6
Eighth Circuit Court of Appeals Rule 47A 11, 12

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents Honda Motor Co., Ltd., American Honda Motor Co., Inc., and Honda R&D Co., Ltd. (collectively, "Honda") respectfully request that this Court deny the petition for writ of certiorari seeking review of the decision of the United States Court of Appeals for the Eighth Circuit entered on March 11, 1993, dismissing Petitioners' appeal.

STATEMENT OF THE CASE

This is a product liability action commenced on August 26, 1991, by Plaintiff Bonita L. Wilburn against Honda. It was tried to a jury, which returned a defense verdict on all counts on October 14, 1992. On October 19, 1992,

the district court entered judgment for Honda. Petitioners Carter, Brownwood, and Hopkins ("Nonparty Appellants") were at no time parties or intervenors in the district court, and the district court at no time entered any judgment or order addressed to them.

The matter that caused Nonparty Appellants to attempt to appeal arose out of pretrial discovery proceedings. On March 20, 1992, during the course of pretrial proceedings, the district court entered a protective order regarding the confidentiality of documents to be produced in discovery ("the March 20 Protective Order"). The order provided, *inter alia*, that confidential documents produced by Honda during discovery could be shown to other lawyers, but only after Plaintiff Wilburn's lawyer had first obtained from each such lawyer a written agreement to be bound by the March 20 Protective Order and to submit to the jurisdiction of the district court in this case for enforcement of that order. (Appendix B, p. 5a.)

On September 23, 1992, one of Honda's outside counsel in this case inadvertently produced several of Honda's attorney-client-privileged and work-product documents to Plaintiff Wilburn's counsel. Wilburn's counsel thereafter provided copies of the documents to Paul A. Nelson, a Florida lawyer who had filed lawsuits against Honda in Florida on behalf of Nonparty Appellants. Mr. Nelson personally executed a written agreement to be bound by the March 20 Protective Order and to be subject to the jurisdiction of the district court in this action for enforcement of that order. Specifically, Mr. Nelson stated:

> I agree to be bound by the terms of the foregoing Protective Order and to be subject to the jurisdiction of the United States District Court for the Western District of Arkansas, Fort Smith Division, for the purposes of enforcement of said Protective Order . . . .

(Appendix B, p. 9a.) At no time did Nonparty Appellants execute any similar agreement, and at no time did

Mr. Nelson execute any similar agreement stating that it was on their behalf.

On September 29, 1992, Honda moved for an order prohibiting further dissemination of its privileged and work-product documents. On October 5, 1992, the district court entered an order holding that the production of Honda's documents had been inadvertent and that no privilege had been waived by the production. On October 16, 1992, the district court entered an additional order prohibiting further dissemination of Honda's documents.

On October 26, 1992, Honda filed a motion for reconsideration of a portion of the October 16 order and a motion to enforce the March 20 Protective Order. In particular, Honda asked the district court to order Mr. Nelson to return his copies of Honda's privileged and work-product documents.

On November 20, 1992, the district court ruled on Honda's motion to enforce the March 20 Protective Order. The court (a) held that the documents in question were properly protected under the March 20 Protective Order and were further protected by the attorney-client privilege and work-product immunity, (b) reiterated that the privilege had not been waived, and (c) ordered that all persons who had obtained copies of the documents and were bound by the March 20 Protective Order were to return the documents to Honda.[1] (*See* Pet. App. A3.)

On December 2, 1992, Mr. Nelson filed in the district court a document entitled "Motion for Protective Order, Motion for Rehearing, and Motion for Oral Argument and Combined Memorandum of Law." Although the

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[1] Although Nonparty Petitioners characterize the November 20, 1992 order of the district court as a "superseding Protective Order," the order in fact was the district court's response to Respondents' request that the March 20 Protective Order be enforced. Thus, it was an order enforcing, not "superseding," the March 20 Protective Order.

caption read "Bonita L. (Anderson) Wilburn, Van Buren, Arkansas, Plaintiff vs. Honda Motor Company, Ltd., et al., Defendants," Mr. Nelson signed the document as "Attorney for Plaintiffs" and began the document by stating, "Come Now Plaintiffs, James Carter, Michael Brownwood, and Drextel Hopkins, by and through their undersigned attorney, and file this Motion . . . ." In fact, neither then nor at any other time were James Carter, Michael Brownwood, and Drextel Hopkins plaintiffs in the district court action. Nor did any of them at any time intervene, or even move to intervene, in the district court action. Nor had Plaintiff Wilburn's counsel provided Honda's documents to them. Nor does the record indicate that anyone else had provided Honda's documents to them. Nor had the district court entered any order addressed to them. Nor had they filed any previous motion, participated in discovery, been served with any subpoena, or otherwise participated in any other way in this case.

On December 9, 1992, Honda filed a Motion for Adjudication of Contempt against Mr. Nelson, alleging violations of the several orders of the district court described above. On the same day, Honda filed a memorandum in opposition to the motion that Mr. Nelson had purported to file on behalf of "Plaintiffs" Carter, Brownwood, and Hopkins. In its memorandum, Honda pointed out that those individuals lacked standing to make the motion filed by Mr. Nelson. It was Mr. Nelson, not Nonparty Appellants Carter, Brownwood, and Hopkins who had received Honda's documents, who had submitted to the district court's jurisdiction, and who was addressed by the district court's orders.

On January 7, 1993, the district court heard Honda's motion for contempt against Mr. Nelson and the motion filed by Mr. Nelson. Mr. Nelson appeared and argued.

On January 15, 1993, the district court entered an order denying "*Mr. Nelson's* Motion for Protective Order, Motion for Rehearing, and Motion for Oral Argument"

(emphasis added) and denying Honda's contempt motion. The court noted that Honda's motion to require Mr. Nelson to return its privileged and work-product documents was moot because Mr. Nelson had returned Honda's privileged and work-product documents in the court's presence and all copies thereby had been returned to Honda. The court further noted that "nothing in the November 20, 1992, Order prohibits Mr. Nelson from attempting to obtain, through legitimate discovery means, the documents in question from any other court." (Pet. App. A2.) Neither on January 15 nor at any other time did the district court require Nonparty Appellants Carter, Brownwood, and Hopkins to do anything or prohibit them from doing anything.[2]

Nonparty Appellants filed their notice of appeal in the court of appeals on January 19, 1993. Neither the plaintiffs in this action nor Mr. Nelson appealed.[3] The court of appeals entered a judgment of dismissal of the appeal on March 11, 1993, and the mandate issued on April 1, 1993.

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[2] Mr. Nelson has, on behalf of Nonparty Appellants Carter (Civil Action No. 91-574-CIV-T-23A) and Hopkins (Civil Action No. 92-574-CIV-T-23A), moved in the United States District Court for the Middle District of Florida, Tampa Division, to compel production of Honda's privileged and work-product documents. That court is the venue for Nonparty Appellants' separate civil actions against Honda. In both cases, that court reviewed the subject documents *in camera* and determined, as had the district court in Arkansas, that Nonparty Appellants' claims were without merit and that the documents were privileged and work-product documents, protected from discovery in civil litigation. No appeal from those separate orders has been taken by Nonparty Appellants Carter and Hopkins.

[3] Although Petitioners' listing of parties to proceedings below (Pet. p. ii) identifies Paul A. Nelson as an appellant in the court of appeals, Mr. Nelson in fact is only counsel of record for Nonparty Appellants in the court of appeals. He did not appeal the district court's ruling in his own name.

REASONS FOR DENIAL OF THE PETITION

I. THE ISSUES PRESENTED IN NONPARTY APPELLANTS' PETITION ARE NOT OF A CHARACTER THAT WARRANTS DISCRETIONARY REVIEW BY THIS COURT.

The petition presents no basis for discretionary review by this Court. The decision of the court of appeals does not conflict with the holding of any other circuit or of any state court of last resort. The court of appeals "has not so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision." Supreme Court Rule 10.1(a). The court of appeals has not decided an important question of federal law that has not yet been settled by this Court. And the court of appeals has not decided a federal question in a manner that conflicts with other applicable decisions of this Court. Rather, the court of appeals' dismissal, under the procedural facts of this case, is mandated by rulings of this Court in *Marino v. Ortiz*, 484 U.S. 301 (1988) (per curiam), and *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 474-75 (1982).

The petition also does not ask this Court to review any rule of law. Instead, it asks this Court to review *factual* findings made by the district court regarding privileged and work-product documents and *factual* findings that underlay the court of appeals' dismissal of the appeal for lack of standing—namely, findings regarding appearances, intervention, and timeliness.

The petition therefore should be denied because it does not present issues that warrant this Court's attention.

II. THE COURT OF APPEALS PROPERLY DISMISSED THE APPEAL BECAUSE NONPARTY APPELLANTS WERE NOT PARTIES, DID NOT INTERVENE, WERE NOT THE SUBJECTS OF ANY ORDER, AND LACKED STANDING TO APPEAL THE DISTRICT COURT'S JUDGMENT.

In *Marino v. Ortiz*, 484 U.S. 301 (1988) (per curiam), this Court reconfirmed that "[t]he rule that only parties to a lawsuit, or those that properly became parties, may appeal an adverse judgment, is well-settled." 484 U.S. at 304. After noting that the court of appeals in that case had suggested that there might be some exceptions to the general rule, this Court disagreed, stating: "We think the better practice is for such a nonparty to seek intervention for purposes of appeal; denials of such motions are, of course, appealable." 484 U.S. at 304. Under the requirements thus stated in *Marino*, Nonparty Appellants in this case lacked standing, and their appeal was properly dismissed.

The facts in *Marino* are analytically identical to the facts here. There, certain groups representing ethnic minority police officers of the New York City Police Department brought a civil rights action against the Department, challenging the Department's promotion practices. Three other groups, primarily representing white police officers, intervened.

The parties reached a settlement, and the district court held a hearing to determine whether to approve it. Several individual white police officers filed objections to the proposed settlement, and their lawyer was allowed to argue at the hearing that the proposed settlement would violate their right to equal protection. *See Hispanic Society v. New York City Police Dept.*, 806 F.2d 1147, 1152 (2d Cir. 1986), *aff'd sub nom. Marino v. Ortiz*, 484 U.S. 301 (1988). Those individual officers never moved to intervene, however.

The district court approved the settlement, specifically rejecting the argument made by the nonparty individuals'

counsel. 806 F.2d at 1152. The nonparty individuals appealed, and the court of appeals dismissed their appeal, stating: "Because appellants never moved to intervene in these proceedings, they are not parties to this litigation, and their appeal must be dismissed." 806 F.2d at 1152. The nonparty individuals argued that their filing of written objections and their appearance at the hearing gave them status as parties, but the court of appeals disagreed, stating: "The fact that appellants were permitted to object to the settlement in the district court does not make them parties, or enable them to appeal from the approval of the settlement." 806 F.2d at 1153. This Court affirmed.

Here, likewise, a lawyer for Nonparty Appellants filed written objections to the district court's proposed order and made oral arguments to the district court regarding the nonparties' interests. Here, too, Nonparty Appellants were not parties and never intervened, or even filed a motion to intervene, pursuant to Federal Rule of Civil Procedure 24. Indeed, Honda's Memorandum of Points and Authorities in Support of Response to Non-Parties' Motion for Protective Order, Motion for Rehearing, and Motion for Oral Argument and Combined Memorandum of Law expressly argued that the nonparties lacked standing, yet the nonparties chose not to cure that defect by moving to intervene. As in *Marino*, therefore, "Appellants' predicament results from their steadfast refusal to comply with the requirements set forth in Fed. R. Civ. P. 24." *Hispanic Society*, 806 F.2d at 1153-54. Exactly as in *Marino*, therefore, the nonparties lack standing to appeal the judgment below, and their appeal was dismissed by the court of appeals. This dismissal is fully consistent with this Court's mandate in *Marino*.

In fact, the basis for dismissal here is even stronger than it was in *Marino*. There, the employment interests of the nonparty appellants were directly and adversely affected by the district court's ruling, and those individuals were precluded from attacking the settlement consent decree in a separate lawsuit. *See Marino*, 484 U.S. at

303. Here, in stark contrast, Nonparty Appellants can seek to obtain the Honda documents they claim to want simply by serving appropriate discovery requests in their own lawsuits in Florida and by moving to compel production if Honda reasserts the attorney-client privilege and attorney-work-product immunity. The district court's order expressly indicates that they may do so. If their motions in their own cases are denied, they may appeal those denials in the appropriate manner and in the appropriate courts.[4]

Therefore, Nonparty Appellants lack standing for the entirely separate reason that they are not "aggrieved" by the judgment from which they seek to appeal. *See, e.g., United States v. Little Joe Trawlers, Inc.*, 780 F.2d 158, 161 (1st Cir. 1986); *Estate of Bishop v. Bechtel Power Corp.*, 905 F.2d 1272, 1276 (9th Cir. 1990).

> [A]t an irreducible minimum, Article III requires the party who invokes the court's authority to "show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant," (citations omitted). . . .

Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 472 (1982). Neither the judgment from which Nonparty Appellants purport to appeal nor any order entered by the district court directs them to do anything or prohibits them from doing anything. Since Nonparty Appellants have not been aggrieved as a result of the district court's orders, they do not have standing to pursue an appeal in this action.

Nonparty Appellants argue that they are aggrieved "because Petitioners were forced by the *Wilburn* court to

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[4] As stated in note 2 above, Nonparty Appellants Carter and Hopkins moved for production of these documents in their individual Florida cases. The orders of the district court in this case do not preclude them from taking action in their own cases, the forum in which they chose to litigate. Nor does any order or judgment in this case prevent them from seeking appellate review in those cases.

return critical documents already in their possession that were not obtainable elsewhere . . . ." (Petition at 15.) They are wrong in every respect. First, it is not true that "Petitioners were forced by the *Wilburn* court" to do anything at all. No order or judgment of that court mentioned them, and they never submited to that court's jurisdiction.[5]

Second, the court did not address any "documents already in their possession . . . ." The only documents in issue were documents in *Mr. Nelson's* possession. The record shows that it is to Mr. Nelson that the documents were provided, Mr. Nelson who signed the protective order, and Mr. Nelson who returned the documents. Nothing in the record suggests that any of the Nonparty Appellants ever even saw the documents, much less possessed them.

Third, if, as Nonparty Appellants assert, the documents "were not obtainable elsewhere"—namely, through proper application of the laws governing discovery, motions to compel, and appeals in Nonparty Appellants' own cases against Honda in Florida—then Nonparty Appellants cannot have been "aggrieved" by the *Wilburn* court's proper application of the same rules of law to deny the documents to Nonparty Appellants.

Finally, Nonparty Appellants are wrong in claiming "*de facto* party status" under the various lower court decisions on which they rely. As Nonparty Appellants themselves concede in their case descriptions, that doc-

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[5] Similarly, Nonparty Appellants' contention that they have standing because their appeal is "of an adverse ruling involving the enforcement of a protective order against them" (Petition at 17) is erroneous. No order was enforced against them. For the same reason, Nonparty Appellants cannot show the "injury in fact" that they concede is required for jurisdictional standing. *See Duke Power Co. v. Carolina Envtl. Study Group Inc.*, 438 U.S. 59 (1978); *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26 (1976). And they plainly are not asserting their own legal rights and interests. *See Valley Forge*, 454 U.S. at 474.

trine arose out of cases in which the nonparty seeking to appeal (1) was a person against whom an injunction had been entered, *Hoxworth v. Blinder, Robinson & Co.*, 903 F.2d 186 (3d Cir. 1990); *Commercial Sec. Bank v. Walker Bank & Trust Co.*, 456 F.2d 1352 (10th Cir. 1972); (2) was a person against whom judgment had been entered, *Hal Roach Studios, Inc. v. Richard Feiner & Co.*, 896 F.2d 1542 (9th Cir. 1989); (3) was a person whose assertion of privilege had been denied, *Overby v. United States Fidelity & Guar. Co.*, 224 F.2d 158 (5th Cir. 1955); or (4) was a person who in some other way was the subject of a court order or judgment or had served or been served with process of some sort, *see, e.g., Johnson v. Trueblood*, 629 F.2d 302 (3d Cir. 1980) (appeal by nonparty attorney from order revoking his *pro hac vice* status). Nonparty Appellants were not addressed by or bound by any order or judgment of the district court. They were not forced to respond to any nonparty discovery. They have no ownership interest, legal or equitable, in the documents in issue. They neither served nor were served with any subpoena or writ in this case. And, unlike the appellant in another case on which they rely, *Securities and Exch. Comm'n v. Wencke*, 783 F.2d 829 (9th Cir.), *cert. denied*, 479 U.S. 818 (1986), they were not "haled into the district court . . . ." (Petition at 18.)

In sum, Nonparty Appellants satisfy none of the requirements for jurisdictional standing or for standing under prudential considerations. The court of appeals therefore properly dismissed their appeal.

III. THE COURT OF APPEALS CORRECTLY APPLIED ITS OWN LOCAL RULE IN DISMISSING NONPARTY APPELLANTS' APPEAL.

Nonparty Appellants contend that the court of appeals improperly applied Rule 47A of that court because Honda's motion to dismiss the appeal was not filed within 15 days from the docketing of the appeal and Honda

did not show good cause to exceed the 15-day period specified in Rule 47A for moving to dismiss an appeal for lack of jurisdiction. That contention is specious.

First, Rule 47A does not apply to dismissals based on the standing doctrine that applies prudential considerations. Second, Honda's motion to dismiss stated that if the court of appeals were to determine that it lacked jurisdiction, it should dismiss this matter *sua sponte*, and the court undeniably had authority to do so. If the record shows that there is no jurisdiction, and if the court of appeals recognizes that fact, no rule of law requires that the appeal must go through the entire appellate process of briefing and argument simply because a motion to dismiss was not filed within 15 days of docketing of the appeal. Principles of judicial economy and fairness to the parties provide good cause to dismiss under those circumstances, and Rule 47A provides an exception for good cause.

Third, the court of appeals is in the best position to interpret the meaning and scope of its own local rule. It would make no sense for this Court to grant review to reinterpret that local rule.

The argument that the court of appeals' dismissal is in error because it was untimely is, therefore, without merit. The court of appeals was within its sound discretion in applying its own Rule 47A in its dismissal of this appeal.

CONCLUSION

The petition does not present any issue that warrants this Court's attention. Rather than being in conflict with any decision of any other circuit or of this Court, the decision of the court of appeals correctly applies the guidelines regarding standing as established by this Court's prior decisions. Further, Nonparty Appellants are not aggrieved by the rulings of the district court or by the judgment of the court of appeals, because they are free to pursue in their own litigation the discovery they seek. Having not intervened in this case below, they have no standing to appeal the district court's orders and judgment not addressed to them.

For the foregoing reasons, review by this Court is neither necessary nor appropriate. Respondents respectfully request that Nonparty Appellants' petition be denied.

Respectfully submitted,

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